IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

WRIT PETITION LODGING NO.623 OF 2006

Kusum Ingots & Alloys Ltd.....Petitioner

Versus

IDBI Limited.....Respondents

Mr. S.G. Doctor, Senior Counsel with Mr.B.B. Parekh, for the Petitioner.

Mr. G.H. Shukla, for the Respondents

CORAM: F.I. REBELLO &
ANOOP V. MOHTA, JJ.
DATE :20TH MARCH, 2006.

P.C.

. It is the case of the petitioners that it is a sick company within the meaning of SIC Act, 1985. From the averments in para.7 the various references which were made under SICA have been set out. Application before BIFR was dismissed, against which Appeals were preferred before AAIFR. The same having been dismissed, the Petitioners approached the Delhi High Court. The Delhi High Court by its order dated 4th October, 2004 in C.P.W. No.1916 of 2000 arising out of the reference No.37 of 1997 has remanded the matter back to B.I.F.R. Similarly, two other References being Reference No.194 of 2001 and 55 of 2002 have been dismissed by BIFR and subsequently by AAIFR which were challenged before the Delhi High Court. The Delhi High Court in C.W.P. No.4334 of 2002 by order dated 7th December, 2004 has remanded the second and third reference to BIFR for fresh consideration. The References are pending before the BIFR. It is the case of the Petitioners that a perusal of the orders of the Delhi High Court will indicate that directions are for revival of the

company. From the records which are annexed to the petition it would be clear that the establishment has been closed down atleast in the year 1996. During the pendency of the proceedings before BIFR the respondent No.1 has issued a notice under Section 13(2)) of the Securitisation Act threatening to take action under Section 13(4) of the Act. It is this notice which is the subject matter of the present petition.

2. The petitioner has formulated the following three challenges. (1) It is firstly contended that as proceedings are pending before D.R.T. under the provisions of the D.R.T. Act being O.A. No.1456 of 1999, it was not open to the Respondent No.1 to have invited the provisions of Securitisation Act. To that extent the issue under Section 12(2) is arbitrary and/or illegal, null and void and consequently liable to be set aside; (2) It is secondly submitted that the Respondent No.1 ought to have taken into consideration the orders passed by the Delhi High Court in two Writ Petitions earlier mentioned by which the matters have been remanded back to BIfR for the purpose of recording a finding that if the company can be revived to take consequent steps thereto. Once the Delhi High Court, it is submitted, had passed such orders then Respondent No.1, ought not to have issued the notice under Section 13(2) of the Securitisation Act and (3) It is then submitted that the record does not indicate that the petitioners have the sanction of 75% of the creditors as contemplated under Section 13(9) of the Securitisation Act. On that count also it is submitted that the notice should be discharged.

2. We have heard learned Counsel for the Petitioners as also Counsel for the Respondent No.1. The issue whether it is open to a second creditor holding a secured asset to move under the provisions of the Securitisation Act when the proceedings were pending under the D.R.T. Act had come up for consideration before a Division Bench of this Court to which one of us (Rebello J.) was a party, in the case of **Vardhaman Samjibhai Dharamsi & Anr. vs. Bank of Maharashtra 2006 (1) Bom. C.R. 394.** On consideration of the law this Court has taken the view that it is open to a secured creditor to move under the Securitisation Act, irrespective of the pendency of the proceedings before the D.R.T. That issue, therefore, is no longer available to the petitioners to be raised before this Court. No argument was also advanced as to why that judgment requires reconsideration. Reference was placed on the judgment of the Apex Court in **A.P.State Financial Corporation vs. M/s.Gar Re-Rolling Mills & Anr., (1994) 2 SCC 647.** That judgment has been considered in Vardhaman Samjibhai Dharamsi (supra).

3. The second contention is that the proceedings are pending before the B.I.F.R. as remanded by the Delhi High Court. The first Writ Petition was filed in the year 2002 and disposed of in the year 2004. Similarly, the second Writ Petition was filed in the year 2002 and the same was disposed of in the year 2004. The Respondent No.1 herein was a party in both the petitions. As noted earlier there is no production in the Company since the year 1996. We are in the year 2006. No orders have been passed by the

B.I.F.R. to hold that the company can be revived. In these circumstances the question is whether the respondent No.1 is barred from moving under the provisions of Section 13(2) of the Securitisation Act. Section 13(2) of the Securitisation Act is a notice to the borrower to discharge the liabilities to the secured creditors within 60 days from the date of the notice failing which the secured creditor shall be entitled to exercise all or any other rights under sub-section (4). On receipt of this notice it is open to the borrower to prefer a Revision under sub-section (3)(a) of Section 13. The secured creditor has thereafter to write to the borrower by giving reasons for his non-acceptance upon which the borrower can proceed under Section 13(4) of the Securitisation Act. It will, therefore, be open to the petitioners, if so advised, to reply to the show cause notice setting out as to why their representation should be accepted and why steps should not be taken under Section 13(4) of the Securitisation Act. Even otherwise considering the scheme of the Securitisation Act, there is no bar on the secured creditor proceeding under the said Act. In our opinion, therefore, it was open to the Respondent No.1 to have issued the notice under Section 13(2) of the Securitisation Act. That contention must, therefore, be rejected.

4. The last contention was on the basis that the notice issued does not have the support of 75% of the secured creditors. Firstly, in the instant case this is not a step taken under Section 13(4). A perusal of Section 13(9) of the Securitisation Act would indicate that it is only when the second creditor proceeds

under Section 13(4) that agreement is required of not less than 3/4th of the other secured creditors. That stage is yet to reach. That contention has, therefore, to be rejected.

5. For the aforesaid reasons we find no merits in this petition, which is accordingly dismissed.

(F.I. REBELLO J)

(ANOOP V. MOHTA, J).